

## **SECTION 411(c)(3)—IRREBUTTABLE PRESUMPTION OF TOTAL DISABILITY OR DEATH DUE TO PNEUMOCONIOSIS**

### **I. Introduction**

Although the terms do not appear in the text of the Act, pneumoconiosis is commonly described as either “simple” or “complicated” to indicate the severity of the disease. Simple pneumoconiosis is generally regarded as a milder form of the disease, while complicated pneumoconiosis is considered to be more advanced and severe:

Complicated pneumoconiosis, generally far more serious [than simple pneumoconiosis], involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary impairment . . . . This disability limits the victim’s physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death.

*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976)(footnote omitted). Aware of “this advanced and progressive stage of the disease,” Congress included a provision in the Act intended to compensate miners who are “clinically diagnosable as extremely ill” with complicated pneumoconiosis. *Usery*, 428 U.S. at 22, 3 BLR at 2-48-49.

Accordingly, Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides that if a miner is suffering or suffered from this more severe form of pneumoconiosis, described by Congress as “a chronic dust disease of the lung” that is diagnosed by the methods specified in Section 411(c)(3), “there shall be an irrebuttable presumption” that the miner is, or was, totally disabled due to pneumoconiosis, or that the miner’s death was due to pneumoconiosis. 30 U.S.C. §921(c)(3).

The irrebuttable presumption is implemented by 20 C.F.R. §718.304, which employs virtually the same language as Section 411(c)(3).

A claimant invokes the irrebuttable presumption by establishing that the miner is suffering or suffered from a chronic dust disease of the lung which: (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is “a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B). . . .” 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

By “explicitly referencing prongs (A) and (B) as guides, prong (C) of the statute requires ‘plainly that equivalency determinations shall be made’” when the diagnosis is by means other than x-ray evidence of large opacities, or biopsy or autopsy evidence of massive lesions. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999)(quoting *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16, 3 BLR 2-86, 2-91 (3d Cir. 1981)).

In determining the validity of a claim, “all relevant evidence shall be considered.” 30 U.S.C. §923(b). Therefore, the administrative law judge must consider and weigh together all of the relevant evidence presented under Section 411(c)(3) to determine whether claimant has established invocation of the irrebuttable presumption. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-627-28 (6th Cir. 1999); *accord, e.g., Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

### **Digests—In General/Analysis of the Evidence**

Throughout “the claim adjudication process, the claimant retains the burden of proving the existence of statutory complicated pneumoconiosis.” *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282, 24 BLR 2-269, 2-280 (4th Cir. 2010)(internal quotation marks and citation omitted). The Fourth Circuit held that, contrary to the employer’s contentions, the administrative law judge maintained the burden of proof on claimant, and based her finding of complicated pneumoconiosis “on all of the available medical evidence . . .” *Cox*, 602 F.3d at 283-85, 24 BLR at 2-282-83.

Rather than promulgate specific standards for diagnosing complicated pneumoconiosis on autopsy, “the [Department of Labor] has elected to proceed in a common-law fashion, requiring [administrative law judges] to carefully examine the medical evidence presented to determine whether complicated pneumoconiosis exists on the unique facts of each case.” *Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 986-87, 24 BLR 2-72, 2-92 (11th Cir. 2007). If “the parties present conflicting medical opinions, the [administrative law judge] must consider the totality of the evidence and make relevant credibility determinations and findings of fact, subject to substantial evidence review . . .” *Cornelius*, 508 F.3d at 987, 24 BLR at 2-94.

Summarizing 20 C.F.R. §718.304, the Fourth Circuit stated, “Thus, by statute or regulation, an opacity of sufficient size--if X-rayed, [greater than] one centimeter; if not, one that is ‘massive’--becomes a proxy for the tissue mass characteristic of complicated pneumoconiosis.” *Perry v. MYNU Coals, Inc.*, 469 F.3d 360, 364, 23 BLR 2-374, 2-384 (4th Cir. 2006)(Williams, CJ., dissenting on other grounds). Further, the court held that what a claimant “need[s] to prove [are] the premises of the presumption and, if proven, the statute provides the irrebuttable presumption of complicated pneumoconiosis.” *Perry*, 469 F.3d at 365, 23 BLR at 2-385.

The Seventh Circuit held that the administrative law judge “properly weighed all relevant medical evidence,” specifically, x-ray readings, biopsy evidence, medical opinions, and CT scan readings, and gave specific reasons for each of his credibility determinations in finding that claimant “suffered from complicated pneumoconiosis and was therefore entitled to [the] irrebuttable presumption . . . .” *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899 (7th Cir. 2003).

To the extent the medical and legal standards for diagnosing complicated pneumoconiosis differ, the administrative law judge must apply the standard enunciated by Congress in Section 411(c)(3). The statute demonstrates no intent to incorporate a purely medical definition of “complicated pneumoconiosis.” *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 257, 22 BLR 2-93, 2-103 (4th Cir. 2000); *see also Blankenship*, 177 F.3d at 244, 22 BLR at 2-562 (“The statute does not mandate use of the medical definition of complicated pneumoconiosis.”).

The Sixth Circuit held that the irrebuttable presumption is not automatically triggered by x-ray evidence showing one or more large opacities when conflicting evidence is presented. Because the Act requires consideration of all relevant evidence, the administrative law judge must weigh together all the evidence presented under the different categories of 20 C.F.R. §718.304 to determine whether the irrebuttable presumption is invoked. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-627-28 (6th Cir. 1999). Consistent with that requirement, the court held, the administrative law judge permissibly determined that positive x-ray readings for large opacities were outweighed by more reliable autopsy evidence indicating that the miner did not have complicated pneumoconiosis, but suffered from simple pneumoconiosis only. *Gray*, 176 F.3d at 388, 21 BLR at 2-626.

The Fourth Circuit held that, in determining whether claimant has established invocation of the irrebuttable presumption, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. The court held that the administrative law judge permissibly found that a single, positive x-ray reading for complicated pneumoconiosis was outweighed by the other evidence in the record indicating that, at most, claimant had simple pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993).

The Board held that, in view of the Act’s requirement to consider all relevant evidence, the administrative law judge must “first determine whether the evidence in each category of [20 C.F.R. §718.304] tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b)[,] and (c) before determining whether invocation of the irrebuttable presumption . . . has been established.” *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

## **II. Methods of Establishing Complicated Pneumoconiosis**

### **A. X-ray Evidence – 20 C.F.R. §718.304(a)**

Complicated pneumoconiosis may be established pursuant to 20 C.F.R. §718.304(a) if the miner suffers or suffered from a chronic dust disease of the lung which, “a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C,” in accordance with the ILO x-ray classification system.

The lesion diagnosed by x-ray must be classified as a large opacity “greater than” one centimeter in diameter; an x-ray interpretation noting the presence of a one-centimeter lesion is insufficient. *Handy v. Director, OWCP*, 16 BLR 1-73, 1-75-76 (1990).

The administrative law judge must consider a physician’s entire x-ray report under 20 C.F.R. §718.304(a), including any additional notations or comments by the physician on the x-ray classification form that detract from the credibility of the x-ray interpretation. A comment that constitutes an alternative diagnosis could call into question the physician’s diagnosis of a large opacity of complicated pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(en banc)(instructing the administrative law judge to consider a physician’s notation that he could not “rule out mesothelioma either side,” when considering the physician’s diagnosis of Category A large opacities).

Comments that do not undermine the credibility of the positive ILO x-ray classification but instead relate to the source of the pneumoconiosis must be considered under 20 C.F.R. §718.203, when determining whether the pneumoconiosis arose out of coal mine employment. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999)(en banc).

### **Digests**

The Fourth Circuit held that the administrative law judge erred in finding that establishing invocation required x-ray “evidence of a one centimeter or greater opacity,” when the Act requires evidence of opacities “greater than” one centimeter in diameter. However, the court determined that the error was harmless, as all the physicians of record agreed that the opacity seen on the miner’s x-ray measured greater than one centimeter. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 n.6, 24 BLR 2-269, 2-292 n.6 (4th Cir. 2010).

In affirming the award of benefits in *Cox*, the Fourth Circuit further held that the administrative law judge permissibly rejected, as speculative and equivocal, the opinions

of employer's experts that large opacities seen on the miner's x-rays were unrelated to coal dust exposure and were likely due to other conditions, such as tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, where those experts failed to point to evidence in the record that the miner was suffering from any of the alternative diseases suggested. *Cox*, 602 F.3d at 286-87, 24 BLR at 2-284-87.

The Seventh Circuit held that, contrary to the employer's contention, the administrative law judge did not "mechanically count votes" when weighing the x-ray evidence, "but rather outlined and considered the conclusions of all reports and the qualifications of all readers before making his determination" that the x-ray readings established large opacities of complicated pneumoconiosis. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899 (7th Cir. 2003). The court held that, in finding that large opacities were established by the x-ray evidence, the administrative law judge permissibly "assign[ed] heightened weight to the interpretations by physicians with superior radiological skills" as dually-qualified, Board-certified radiologists and B readers. *Id.*

The Fourth Circuit held that, in finding that the x-ray evidence met the standard for invoking the irrebuttable presumption, the administrative law judge permissibly accorded greater weight to a more recent x-ray than to earlier x-rays, where the x-ray evidence "indicat[ed] a progression in the severity of the miner's pneumoconiotic symptoms from 1970 onward." *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 259, 22 BLR 2-93, 2-105 (4th Cir. 2000). On those facts, the court held, the administrative law judge's "'later is better' rule was not imposed mechanically or arbitrarily, but was applied in the context of a record in which the later x-rays were not inconsistent with the earlier ones." *Scarbro*, 220 F.3d at 259, 22 BLR at 2-105-06.

The Board held that the administrative law judge erred in his analysis of the conflicting x-ray readings regarding the existence of complicated pneumoconiosis where he (1) found, without evidence in the record, that the readings from the employer's physicians merited less weight because those physicians were biased; (2) failed to consider all of the radiological qualifications of each physician; and (3) failed to consider a physician's x-ray report in its entirety, where that report contained additional comments that may have been an alternative diagnosis calling into question the physician's diagnosis of Category A large opacities. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-37 (1991)(en banc).

The Board affirmed the administrative law judge's finding that the sole positive x-ray reading for complicated pneumoconiosis was outweighed by the other x-ray evidence, which included eight negative x-rays, and two B readers' opinions that the x-ray read as positive was, in fact, unreadable. *King v. Cannelton Indus., Inc.*, 8 BLR 1-146, 1-148 (1985).

The Board held that the administrative law judge properly found that the Section 411(c)(3) presumption was not invoked where only one x-ray report diagnosed a large opacity and, with the exception of one negative x-ray reading, all the other x-rays were read as positive for simple pneumoconiosis only. *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-685 (1985).

## **Digital X-rays**

**Taken and Interpreted Before May 19, 2014:** The Department of Labor lacked quality standards for digital x-rays. Accordingly, digital x-rays taken and read before the adoption of applicable quality standards are not considered as conventional, film-based x-rays under 20 C.F.R. §718.304(a), but are treated as “other medical evidence” admissible under 20 C.F.R. §718.107, and are considered under 20 C.F.R. §718.304(c). See the topic heading below addressing “Other Means” evidence, for more on the treatment of digital x-rays taken and read before the adoption of applicable quality standards.

**Taken and Interpreted After May 19, 2014:** Effective May 19, 2014, the Department promulgated quality standards for administering and interpreting digital x-rays for the existence of pneumoconiosis. 79 Fed. Reg. 21,606 (April 17, 2014)(Final Rule)(to be codified at 20 C.F.R. §§718.101, 718.102, 718.202, 718.304, and App. A). In adopting quality standards for digital x-rays, the Department indicated its intent that digital x-rays made and interpreted in accordance with those standards will be admitted into evidence, considered, and weighed in the same manner as film-based x-rays. 79 Fed. Reg. at 21,607. Therefore, digital x-rays subject to, and in substantial compliance with, the new quality standards will be considered under 20 C.F.R. §718.304(a).

### **B. Biopsy or Autopsy Evidence – 20 C.F.R. §718.304(b)**

Pursuant to 20 C.F.R. §718.304(b), complicated pneumoconiosis may be established if the miner suffers or suffered from a chronic dust disease of the lung which “(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung.”

Citing the lack of evidence that the medical community agrees on a particular pathologic standard for diagnosing pneumoconiosis, the Department of Labor has declined to adopt any particular standard for diagnosing “massive lesions” by biopsy or autopsy evidence. 65 Fed. Reg. 79,920, 79,936 (Dec. 20, 2000). Thus, for example, the Department declined to adopt a two-centimeter lesion standard that was set forth in a 1979 research article. *Id.*; see also *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 244, 22 BLR 2-554, 2-562 (4th Cir. 1999)(declining “to impose the two-centimeter rule”).

As a general rule, the autopsy evidence is sufficient if the administrative law judge finds that it “adequately describes the condition comprehended by the regulatory term ‘massive lesions.’” *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3, 1-5 (1991).

The term “progressive massive fibrosis” may be used to refer to complicated pneumoconiosis. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976). When used in a biopsy or autopsy diagnosis, the term “progressive massive fibrosis” has been held to be equivalent to “massive lesions.” See *Perry v. MYNU Coals, Inc.*, 469 F.3d 360, 365 & n.4, 23 BLR 2-374, 2-384-85 & n.4 (4th Cir. 2006); *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 898-99 (7th Cir. 2003).

Definition of “massive lesions” in the Fourth Circuit: As will be discussed in more detail below, the Fourth Circuit has developed a body of case law requiring equivalency determinations for biopsy and autopsy evidence, in which the court has defined the term “massive lesions” with reference to an x-ray diagnosis of large opacities. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999)(“[M]assive lesions, as described in prong (B), are lesions that when x-rayed, show as opacities greater than one centimeter in diameter.”); *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000)(“[X]-ray evidence provides the benchmark for determining what under prong (B) is a ‘massive lesion’ . . . .”); but see *Perry v. MYNU Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384-85 (4th Cir. 2006)(holding that autopsy prosector’s description of massive lesions in both lungs was “sufficient to trigger the presumption”). For more on this topic, see the discussion below under the topic heading for whether equivalency determinations are required for biopsy/autopsy evidence to establish massive lesions.

### **Digests—Massive Lesions, generally; Weighing of Biopsy or Autopsy Evidence**

Persuaded by the Eleventh Circuit’s approach (see next digest), the Tenth Circuit declined to read into the term “massive lesions” any requirement beyond an autopsy or biopsy diagnosis of complicated pneumoconiosis made under accepted medical standards. *Bridger Coal Co. v. Director, OWCP [Ashmore]*, 669 F.3d 1183, 1194, 25 BLR 2-89, 2-108 (10th Cir. 2012). Because the autopsy prosector described anthracotic scarring measuring up to 6.35 centimeters and diagnosed “complicated coal workers’ pneumoconiosis (progressive massive fibrosis),” and the administrative law judge permissibly accorded greater weight to the prosector’s opinion, the court held that substantial evidence supported the finding of massive lesions. *Ashmore*, 669 F.3d at 1194, 25 BLR at 2-108-09.

The Eleventh Circuit held that, rather than promulgate specific standards for diagnosing complicated pneumoconiosis on autopsy, “the [Department of Labor] has elected to proceed in a common-law fashion, requiring [administrative law judges] to carefully examine the medical evidence presented to determine whether complicated pneumoconiosis exists on the unique facts of each case.” *Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 986-87, 24 BLR 2-72, 2-92 (11th Cir. 2007). Under this approach, the court held, “it is sufficient if the claimant can establish by a preponderance

of the evidence that the miner's autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards." *Id.* The court concluded that substantial evidence supported the administrative law judge's finding of massive lesions, as the autopsy prosector diagnosed numerous lesions measuring 1.2 centimeters in diameter, and explained how her autopsy findings satisfied the criteria for diagnosing complicated pneumoconiosis. *Cornelius*, 508 F.3d at 988-89, 24 BLR at 2-96.

The Seventh Circuit held that the administrative law judge permissibly relied on the opinion of a "Board Certified pathologist" that the miner's biopsy reflected that he had "progressive, massive fibrosis," and therefore suffered from complicated pneumoconiosis. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 898-99 (7th Cir. 2003).

The Board held that substantial evidence supported the administrative law judge's finding of "massive lesions" where the administrative law judge determined that the autopsy prosector's description of lesions that were "large, firm and black," measuring "up to 1.0 cm in diameter," along with the prosector's diagnosis of complicated pneumoconiosis, "adequately described the condition comprehended by the regulatory term 'massive lesions.'" *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3, 1-5 (1991). The Board further held that, on the facts of the case, the administrative law judge acted within his discretion in according greater weight to the opinion of the autopsy prosector, and less weight to the opinions of pathologists who reviewed histological slides. *Id.*

The Board held that the administrative law judge properly found that "massive lesions" were not established where the autopsy report described only "adhesions . . . between the lungs and chest wall" and "scarring of the lung parenchyma . . . ." *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-87 (1988).

The Board affirmed the administrative law judge's finding that complicated pneumoconiosis was not established, where he permissibly accorded greater weight to a physician's earlier biopsy report concluding that a four-centimeter nodule was a "pulmonary hamartoma," a benign, tumor-like nodule, than to the physician's later report diagnosing complicated pneumoconiosis and progressive massive fibrosis. *Reilly v. Director, OWCP*, 7 BLR 1-139, 1-142 (1984).

#### **1. Whether an Equivalency Determination is Required for Prong (B) Biopsy or Autopsy Evidence to Establish "Massive Lesions."**

Under Prong (C) of Section 411(c)(3), the Act requires equivalency determinations when the diagnosis is made by means other than x-ray evidence or biopsy or autopsy evidence. 30 U.S.C. §921(c)(3)(C). An issue that has arisen is whether the Act also requires an equivalency determination when the diagnosis is made by Prong (B) evidence; that is,

whether the results of a biopsy or autopsy must be compared with an x-ray diagnosis of large opacities to determine whether the biopsy or autopsy findings would show as an opacity measuring greater than one centimeter in diameter if seen on an x-ray. The Fourth Circuit has held that such an equivalency determination is required in order for autopsy evidence to establish “massive lesions.” *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999)(“Logic commands that prongs (A) and (B) be similarly equivalent.”).

To date, no other circuit has adopted the Fourth Circuit’s approach of requiring that autopsy or biopsy findings be compared to what would be seen if those findings were viewed on an x-ray, in order to establish “massive lesions.” Below, this section will first address the Fourth Circuit’s holdings requiring such an equivalency determination for biopsy or autopsy evidence, and will then address cases in the other circuits that have not required an equivalency determination for such evidence. Board cases applying a particular circuit’s law are also addressed. The reader is advised that in some cases quoted below, the court may refer to a “one-centimeter” opacity on x-ray, when the correct term is a “greater than” one-centimeter opacity. To avoid the insertion of repetitive alterations, such quotes have not been corrected.

#### **a. Fourth Circuit—Comparison to X-ray Evidence Is Required**

In *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), an administrative law judge found that a pathologist’s biopsy diagnosis of a 1.3 centimeter lesion of “anthrasilicotic pneumoconiosis with massive fibrosis” established “massive lesions” under 20 C.F.R. §718.304(b), and the Board affirmed. On appeal, the Fourth Circuit held that because clauses (A), (B), and (C) of Section 411(c)(3) provide three different ways of diagnosing complicated pneumoconiosis, the administrative law judge must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. Noting that prong (C) requires equivalency determinations for diagnoses by other means, the court reasoned that prongs (A) and (B) must be similarly equivalent, since it would be “irrational for the question of whether a miner has complicated pneumoconiosis to turn on the method of diagnosis rather than on the severity of his disease.” *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. The court held that, since prong (A) sets out an “objective scientific standard” of an opacity measuring greater than one centimeter in diameter on an x-ray, it also provides the mechanism for determining equivalencies under prong (B) or prong (C). *Id.* Thus, if a diagnosis is by biopsy or autopsy, “it must therefore be determined whether the biopsy results show a condition that would produce opacities of greater than one centimeter in diameter on an x-ray. That is to say, ‘massive lesions,’ as described in prong (B), are lesions that when x-rayed, show as opacities greater than one centimeter in diameter.” *Id.* Because the administrative law judge did not make that determination, the court vacated the award of benefits, and remanded the case for the administrative law judge to consider whether the

1.3 centimeter lesion diagnosed by biopsy as “massive fibrosis” would, “if x-rayed . . . have showed as a one-centimeter opacity.” *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562.

In remanding the case, the *Blankenship* court declined to impose a rule “frequently expressed in the medical community” that a lesion must be at least two centimeters in diameter to constitute complicated pneumoconiosis. *Blankenship*, 177 F.3d at 244, 22 BLR at 2-561. The court held: “The statute does not mandate use of the medical definition of complicated pneumoconiosis. Rather, it requires, if diagnosis is by biopsy, that a miner have “massive lesions,” which, as we have noted, are lesions that would show on an x-ray as opacities of at least one centimeter. In short, 30 U.S.C. §921(c)(3) requires that an equivalency determination be made.” 177 F.3d at 244, 22 BLR at 2-562.

In its next case addressing the “massive lesions” issue, the Fourth Circuit reiterated that “x-ray evidence provides the benchmark for determining what under prong (B) is a ‘massive lesion’ . . . .” *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000). In *Scarbro*, the administrative law judge found that the x-ray evidence established the existence of large opacities, and that the autopsy evidence of nodules measuring up to 1.7 centimeters established massive lesions; the Board affirmed. On appeal, the court held that the administrative law judge’s analysis of the autopsy evidence under prong (B) “was incorrect” because he failed to conduct an equivalency determination, but determined that the administrative law judge still properly found invocation established, because the autopsy evidence did not undermine the finding that the x-ray evidence satisfied prong (A). *Scarbro*, 220 F.3d at 257, 22 BLR at 2-102. The court further held that, on the evidence presented, it was given no reason to believe that the nodules of 1.7 centimeters seen on autopsy would not show as opacities greater than one centimeter on an x-ray, noting that the more recent, overwhelmingly positive x-ray evidence of large opacities “provide[d] persuasive evidence that the miner’s lesions did in fact show as opacities of that size.” *Scarbro*, 220 F.3d at 258, 22 BLR at 2-105.

Thereafter, applying Fourth Circuit law, the Board affirmed an administrative law judge’s finding of invocation of the irrebuttable presumption. *Braenovich v. Cannellton Indus.*, 22 BLR 1-236 (2003)(Gabauer, J., concurring). The Board held that substantial evidence in the form of a physician’s opinion, as corroborated by that of another physician, supported the administrative law judge’s finding that a 1.5 centimeter lesion observed on autopsy, which the administrative law judge determined was the more probative evidence, would have produced an opacity of equivalent size if viewed on x-ray. *Braenovich*, 22 BLR at 1-243-45. The Board further held that the administrative law judge’s conclusion was not undercut by the fact that the miner’s x-rays did not show large opacities. *Id.* Finally, the Board rejected the employer’s argument that the administrative law judge committed reversible error in considering medical opinions that were based on reviews of autopsy evidence under subsection (c) of 718.304, rather than under subsection (b). *Braenovich*, 22 BLR at 1-248-49 (holding that employer’s

argument was “of no consequence” because substantial evidence supported the finding of invocation under 20 C.F.R. §718.304 “pursuant to *Scarbro* and *Blankenship*”).

Applying Fourth Circuit law, the Board affirmed an administrative law judge’s determination that a physician’s testimony, that a twelve-millimeter nodule viewed on the miner’s lobectomy and two-centimeter lesions viewed on the miner’s autopsy slides would “look like complicated pneumoconiosis on x-ray,” fell short of a specific opinion that those lesions would be seen as greater than one centimeter opacities on an x-ray. *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311-12 (2003). The Board thus held that the administrative law judge properly found the physician’s testimony insufficient to support the requisite equivalency determination for establishing invocation of the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. §718.304. *Gollie*, 22 BLR at 1-312.

In the next Fourth Circuit opinion addressing autopsy evidence, *Perry v. MYNU Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006), the court rendered alternative holdings regarding “massive lesions.” In *Perry*, the administrative law judge applied the *Blankenship/Scarbro* standard and determined that the masses the autopsy prosector described did not satisfy the massive lesions requirement, because the physician’s testimony equating those masses to large opacities on x-ray was found to be equivocal. The Board affirmed. On appeal, the Fourth Circuit reversed, first holding that, since the autopsy prosector described four-centimeter and six-centimeter nodules, and diagnosed complicated pneumoconiosis and progressive massive fibrosis, the evidence “could only lead one to conclude that massive lesions were present . . . sufficient to trigger the presumption under [prong] (b).” *Perry*, 469 F.3d at 365, 23 BLR at 2-384-85. The court stated that the prosector’s description of massive lesions was “another statutory ground for application of the presumption,” *Id.*, apparently meaning an independent ground, apart from any need to prove that opacities greater than one centimeter in diameter would have been shown on an x-ray. *But see Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561.

The court in *Perry* went on to hold that the administrative law judge erred in discounting the autopsy prosector’s equivalency determination testimony. Specifically, the court held that the autopsy prosector’s testimony, that the four-centimeter and six-centimeter masses observed on the autopsy would have appeared as opacities greater than one centimeter in diameter had they been x-rayed, was sufficient to trigger the irrebuttable presumption under 20 C.F.R. §718.304(b), notwithstanding the physician’s use of cautious language. While the prosector stated that he was not “one-hundred percent sure” of his conclusion, the court indicated that, read in context, the prosector’s qualification was at most an acknowledgment that uncertainty is part of medicine, and that this refusal to express a diagnosis in categorical terms constituted candor, not equivocation, which enhanced rather than undermined the prosector’s credibility. *Perry*, 469 F.3d at 365-66, 23 BLR at 2-385-87.

In a case the Fourth Circuit decided in 2010, the issue was not whether biopsy or autopsy evidence established massive lesions, but whether substantial evidence supported the administrative law judge's finding that x-ray evidence of large opacities, CT scan evidence of large masses, and biopsy evidence showing signs of pneumoconiosis, invoked the irrebuttable presumption. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282, 24 BLR 2-269, 2-280 (4th Cir. 2010). However, in affirming the award in *Cox*, the court reiterated its *Scarbro* framework for invoking the irrebuttable presumption, emphasizing that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates *a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray*," and held that the administrative law judge's decision complied with that standard. *Id.* (emphasis added).

### **b. Third Circuit**

In *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019 (1980)(Miller, J., dissenting), the autopsy evidence did not contain a specific diagnosis of "massive lesions," but the administrative law judge found that Section 411(c)(3) invocation was established based on a physician's statement that he equated the nodules he found on autopsy to one-centimeter opacities on x-rays. In a divided opinion, the Board reversed the award of benefits, holding that the equivalency determination was improper, because an administrative law judge lacks the medical expertise to make such a determination. *Clites*, 2 BLR at 1-1027.

On appeal, the Third Circuit reversed, holding that substantial evidence supported the administrative law judge's finding that, even though the term "massive lesions" did not appear in the autopsy report, "massive lesions" were present in the miner's lungs based on the physician's statement comparing the autopsy findings to opacities that would be detected on x-rays. *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16, 3 BLR 2-86, 2-91 (3d Cir. 1981). The court held that Prong (C) "states plainly that equivalency determinations shall be made. They cannot be made without some evidentiary basis, but here there was such a basis." *Id.*

It is noted that the court in *Clites* upheld the administrative law judge's equivalency determination on the facts presented and did so under Prong (C) of the Act; the court did not address whether an equivalency determination would be mandated even where the autopsy or biopsy evidence specifically diagnoses "massive lesions" or, for example, where the autopsy or biopsy diagnosis is phrased in terms of "complicated pneumoconiosis" or "progressive massive fibrosis."

The Board construed the Third Circuit's holding in *Clites* as requiring that, where the autopsy evidence does not diagnose "massive lesions," any determination of whether the autopsy findings would correspond in size to opacities viewed on x-ray must be based on

medical evidence. *Smith v. Island Creek Coal Co.*, 7 BLR 1-734, 1-738 (1985); *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264, 1-1267 (1984).

**c. Sixth Circuit**

In affirming the denial of benefits, the Sixth Circuit rejected the claimant's argument that the greater-than-one-centimeter standard applicable to x-ray evidence under 20 C.F.R. §718.304(a) should also apply to establish invocation under 20 C.F.R. §718.304(b) if the autopsy evidence diagnoses a lesion measuring greater than one centimeter. The court held that the administrative law judge permissibly credited a pathologist's opinion that 1.5-centimeter lesions seen on autopsy were not complicated pneumoconiosis because they would not appear as opacities greater than one centimeter on an x-ray, nor were they "massive lesions." *Gray v. SLC Coal Co.*, 176 F.3d 382, 390, 21 BLR 2-615, 2-630 (6th Cir. 1999).

**d. Seventh Circuit**

Affirming the award of benefits, the Seventh Circuit held that the administrative law judge permissibly relied on the opinion of a "Board Certified pathologist" that the miner's biopsy reflected that he had "progressive, massive fibrosis," and concluded he suffered from complicated pneumoconiosis. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 898-99 (7th Cir. 2003). The Seventh Circuit upheld the administrative law judge's additional determination that the biopsy evidence supported the positive x-ray evidence, *Hawker*, 326 F.3d at 899, but did not indicate that an equivalency determination was required for biopsy evidence.

**e. Tenth Circuit**

The Tenth Circuit specifically rejected the equivalency test set forth by the Fourth Circuit in *Blankenship* and *Scarbro*. Instead, the Tenth Circuit adopted the approach of the Eleventh Circuit in *Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007), holding that an equivalency determination is not necessary to establish the existence of "massive lesions" under 20 C.F.R. §718.304(b). The Tenth Circuit held that requiring equivalency determinations in applying the Section 411(c)(3) presumption for autopsy evidence of "massive lesions" was "contrary to the plain language of the statute and, thus, inconsistent with congressional intent." *Bridger Coal Co. v. Director, OWCP [Ashmore]*, 669 F.3d 1183, 1194, 25 BLR 2-89, 2-108 (10th Cir. 2012). Because the autopsy prosector described anthracotic scarring measuring up to 6.35 centimeters and diagnosed "complicated coal workers' pneumoconiosis (progressive massive fibrosis)," and the administrative law judge permissibly accorded greater weight to the prosector's opinion, the court held that substantial evidence supported the finding of massive lesions. *Ashmore*, 669 F.3d at 1194, 25 BLR at 2-108-09.

#### **f. Eleventh Circuit**

The Eleventh Circuit declined to follow the Fourth Circuit in requiring claimants to prove that biopsy or autopsy lesions, if x-rayed, would show as opacities greater than one centimeter in diameter in order to establish “massive lesions” under Section 411(c)(3)(B). *Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007). In a lengthy footnote, the court identified several shortcomings in the Fourth Circuit’s approach which, in the court’s view, amounted to misreading the statute and attaching too much importance to x-rays, even though autopsies are generally more reliable. *Cornelius*, 508 F.3d at 987 n.7, 24 BLR at 2-94 n.7. The court concluded that Section 411(c)(3)(B) and 20 C.F.R. §718.304(b) “do not require that an equivalency determination be made between autopsy findings and x-rays. Those provisions focus on what the autopsy itself reveals, rather than on what the autopsy results might look like on a hypothetical x-ray.” *Id.*

#### **C. “Other Means” Evidence – 20 C.F.R. §718.304(c)**

Pursuant to 20 C.F.R. §718.304(c), complicated pneumoconiosis may be established where the miner suffers or suffered from a chronic dust disease of the lung which “When diagnosed by means other than those specified in paragraphs (a) and (b) . . . would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) had diagnosis been made as therein described . . . .” 20 C.F.R. §718.304(c). However, any diagnosis made under this section must “accord with acceptable medical procedures.” *Id.* Thus, a diagnosis by means other than x-ray or biopsy/evidence is considered under this section.

Typically, under prong (C) the Board encounters CT scan readings and medical opinions. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Less frequently, the Board encounters digital x-ray readings that have been considered as other medical evidence under prong (C) because, until recently, the Department of Labor lacked quality standards for digital x-rays. *See Roark v. Fairbanks Coal Co.*, BRB No. 14-0174 BLA (Aug. 25, 2014)(unpub.).

The treatment of digital x-rays will change, for digital x-rays taken and read after the effective date of recent revisions to the regulations, in which the Department promulgated quality standards for digital x-rays. See the topic heading below, addressing digital x-rays taken and interpreted after May 19, 2014.

#### **CT scans**

Since there are no quality standards for CT scans, their admissibility is governed by 20 C.F.R. §718.107, which provides for the consideration of “other medical evidence.” The

“party submitting the test or procedure . . . bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant’s entitlement to benefits.” 20 C.F.R. §718.107(b); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006)(en banc)(Boggs, J., concurring), *aff’d on recon.*, 24 BLR 1-1 (2007)(en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-117-18 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting on other grounds), *aff’d on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting on other grounds). If admitted, CT scans are then considered at 20 C.F.R. §718.304(c).

Although the regulations provide no guidance for the evaluation of CT scans, 20 C.F.R. §718.304(c) provides for new methods of diagnosis, and allows the consideration of any acceptable medical means of diagnosis. Therefore, CT scans are not to be considered as conventional x-rays under subsection (a), but must be evaluated pursuant to subsection (c), together with any evidence or testimony bearing on the reliability and utility of CT scans, and any other evidence not relevant under subsections (a) and (b). *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

### **Digital X-rays Taken and Interpreted Before May 19, 2014**

Digital x-rays taken and read before the adoption of applicable quality standards are considered as “other medical evidence,” and their admissibility is governed by 20 C.F.R. §718.107, as discussed above in relation to CT scans.

If they are admitted under 20 C.F.R. §718.107, the digital x-ray readings are then evaluated under 20 C.F.R. §718.304(c). *See Melnick*, 16 BLR at 1-34.

### **Digital X-rays Taken and Interpreted After May 19, 2014**

Effective May 19, 2014, the Department promulgated quality standards for administering and interpreting digital x-rays for the existence of pneumoconiosis. 79 Fed. Reg. 21,606 (April 17, 2014)(Final Rule)(to be codified at 20 C.F.R. §§718.101, 718.102, 718.202, 718.304, and App. A). In adopting quality standards for digital x-rays, the Department indicated its intent that digital x-rays made and interpreted in accordance with those standards will be admitted into evidence, considered, and weighed in the same manner as film-based x-rays. 79 Fed. Reg. at 21,607. Therefore, digital x-rays subject to, and in substantial compliance with, the new quality standards will be considered under 20 C.F.R. §718.304(a).

### **Equivalency Determinations for Prong (C) “Other Means” Evidence**

Where the diagnosis of complicated pneumoconiosis is made “by means other than” x-ray evidence of large opacities or biopsy or autopsy evidence of massive lesions, the Act requires that an equivalency determination be made, since 30 U.S.C. §921(c)(3)(C) refers

to “a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B). . . .”

Thus, as written, the Act requires that a diagnosis by Prong (C) evidence must be compared to the results that would be obtained either by an x-ray diagnosis of large opacities, or a diagnosis by biopsy or autopsy evidence of massive lesions, to ensure that the Prong (C) evidence has made an equivalent diagnosis. *See Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 987 n.7, 24 BLR 2-72, 2-94 n.7 (11th Cir. 2007); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Gray v. SLC Coal Co.*, 176 F.3d 382, 390, 21 BLR 2-615, 2-630 (6th Cir. 1999); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16, 3 BLR 2-86, 2-91 (3d Cir. 1981).

### **III. Application of the Irrebuttable Presumption in Survivors’ Claims**

The survivor of a miner is entitled to benefits under the Act if the survivor establishes that the miner died due to pneumoconiosis. 30 U.S.C. §901(a). Under Section 411(c)(3), there is “an irrebuttable presumption . . . that [the miner’s] death was due to pneumoconiosis” when the survivor establishes that the miner had complicated pneumoconiosis. 30 U.S.C. §921(c)(3). The effect of the irrebuttable presumption of death due to pneumoconiosis “is to grant benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner’s death was caused by pneumoconiosis.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24, 3 BLR 2-36, 2-50 (1976); *see* 20 C.F.R. §718.205(b)(3).

Note: Before 1982, the Act also provided for entitlement to survivor’s benefits based on a finding that the miner was totally disabled due to pneumoconiosis at the time of death. 30 U.S.C. §901(a) (1977). Section 411(c)(3) still contains the language that provided for that basis of entitlement. However, the 1981 amendments to the Act eliminated survivor’s benefits based on a miner’s total disability, for claims filed on or after January 1, 1982. Pub. L. No. 97-119, §203(a), 95 Stat. 1644. Therefore, a claimant cannot receive benefits in a post-1981 survivor’s claim by showing that the miner was totally disabled due to pneumoconiosis at the time of death, via the Section 411(c)(3) irrebuttable presumption.

### **Death Due to Traumatic Injury or a Medical Condition Unrelated to Pneumoconiosis Does not Preclude Entitlement to Survivor’s Benefits Under Section 411(c)(3)**

The “traumatic injury” issue arose because the former regulation governing survivors’ claims provided that a survivor was not entitled to benefits where the miner’s death was caused by a traumatic injury or other condition, unless the survivor established that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R.

§718.205(c)(4) (2001). Where a survivor established invocation of the irrebuttable presumption of death due to pneumoconiosis, the party opposing entitlement would use the regulatory language to argue that the miner's death from suicide, some other traumatic injury, or a disease unrelated to pneumoconiosis, precluded entitlement to survivor's benefits. However, because the presumption is irrebuttable, those arguments failed. See digests, below.

The argument is foreclosed by the current regulations. Under the regulations as revised effective October 23, 2013, the Department of Labor clarified that, "*except where the §718.304 presumption is invoked*, survivors are not entitled to benefits where the miner's death was caused by a traumatic injury (including suicide), or the principal cause of death was a medical condition not related to pneumoconiosis, unless the claimant establishes . . . that pneumoconiosis was a substantially contributing cause of death." 20 C.F.R. §718.205(b)(5)(emphasis added).

### **Digests**

Once the existence of the condition known as complicated pneumoconiosis has been established pursuant to 20 C.F.R. §718.304, a claimant is entitled to the irrebuttable presumption that the miner's death was due to that condition. Thus any interpretation of the former 20 C.F.R. §718.205(c)(4) "allow[ing] this statutorily created mandatory 'irrebuttable' presumption somehow to be rebutted" by proof that the miner died of a condition unrelated to pneumoconiosis, would be invalid. *Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 981, 24 BLR 2-72, 2-84 (11th Cir. 2007).

The miner's death from a self-inflicted gunshot wound would not preclude an award of survivor's benefits if it could be established that the miner suffered from complicated pneumoconiosis, entitling the survivor to the irrebuttable presumption of death due to pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87, 21 BLR 2-615, 2-623-24 (6th Cir. 1999).

The "irrebuttable presumption of death due to pneumoconiosis . . . is controlling despite the fact that the death of a miner is caused by traumatic injury." *Sumner v. Blue Diamond Coal Corp.*, 12 BLR 1-74, 1-76 (1988)(motor vehicle accident).

### **IV. Following Invocation, Claimant Must Establish the Disease Causation Element**

If the administrative law judge determines that claimant has established the existence of complicated pneumoconiosis, claimant must then establish that the complicated pneumoconiosis arose out of coal mine employment. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22, n.21, 3 BLR 2-36, 2-48, n.21 (1976)("Although the premise of 411 (c) (3), that the miner have a 'chronic dust disease of the lung,' does not explicitly

provide that the disease must be one arising out of employment in a coal mine, it is clear under §422(a) [30 U.S.C. §932(a)] . . . that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine.”).

A miner who establishes at least ten years of coal mine employment is entitled to a rebuttable presumption that his or her pneumoconiosis arose out of coal mine employment. 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203(b). A miner with less than ten years of coal mine employment must establish, with “competent evidence,” that the pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(c).

Comments on an x-ray classification form that do not undermine the credibility of the positive ILO x-ray classification but instead relate to the source of the pneumoconiosis, are considered under 20 C.F.R. §718.203, when determining whether the pneumoconiosis arose out of coal mine employment. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999)(en banc).

## **Digests**

The Fourth Circuit held that the irrebuttable presumption of total disability due to pneumoconiosis does not establish the disease causation element of the claim. Specifically, the court held that “the miner must . . . independently establish the second element—that his ‘pneumoconiosis arose at least in part out of coal mine employment.’” *Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007)(quoting 20 C.F.R. §718.203(a)). Because the administrative law judge erred in calculating the length of claimant’s coal mine employment when she found more than ten years established, the administrative law judge, on remand, had to reconsider the length of claimant’s coal mine employment, and then reconsider the physicians’ opinions that claimant’s x-ray opacities could not have resulted from his limited coal mine dust exposure. *Mitchell*, 479 F.3d at 339, 24 BLR at 2-31-32.

Where a miner established thirty-two years of coal mine employment and, therefore, was entitled to the 20 C.F.R. §718.203(b) presumption that his pneumoconiosis arose out of coal mine employment, as a practical matter the miner “need prove nothing more than his complicated pneumoconiosis to be entitled to benefits.” *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1360, 20 BLR 2-227, 2-230 (4th Cir. 1996)(en banc).

## **V. Determining the Benefits Commencement Date Where the Irrebuttable Presumption is Invoked**

### **General Rules**

A miner is entitled to benefits beginning with the month in which he became totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R.

§725.503(b). Where the evidence does not establish the month of onset of total disability due to pneumoconiosis, benefits are payable beginning with the month during which the claim was filed, *Id.*, unless credited medical evidence shows that the miner was not totally disabled for some period after the claim filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990). For subsequent claim awards, and awards made pursuant to a grant of modification, the regulations provide additional rules for determining the benefits commencement date. 20 C.F.R. §§725.309(c)(6); 725.503(d). A survivor is entitled to benefits beginning with the month of the miner's death. 20 C.F.R. §725.503(c).

### **Application to 411(c)(3) Cases**

Where benefits are awarded based on invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the miner is entitled to benefits as of the month in which his simple pneumoconiosis became complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). Thus, the administrative law judge must consider whether the evidence of record establishes an onset date of the miner's complicated pneumoconiosis. *Id.* If the onset date of complicated pneumoconiosis cannot be determined, the miner is entitled to benefits as of the month in which he filed his claim, unless the evidence affirmatively establishes that the miner had only simple pneumoconiosis for any period subsequent to the filing date, in which case benefits commence following the period of simple pneumoconiosis. *Id.*

A miner who invokes the irrebuttable presumption is entitled to benefits as of the month in which complicated pneumoconiosis is established, regardless of whether the miner is still engaged in coal mine employment. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 11, 3 BLR 2-36, 2-40 (1976)("[T]he presumption operates conclusively to establish entitlement to benefits."); *Justus v. J & L Coal Co.*, 3 BLR 1-185, 1-189 (1981)("[A] miner who establishes the existence of complicated pneumoconiosis is irrebuttably presumed totally disabled due to pneumoconiosis as of the month complicated pneumoconiosis is established, even though the [miner] may still be working.").

### **Digests**

In a miner's claim, the Tenth Circuit held that an autopsy diagnosis of complicated pneumoconiosis credited by the administrative law judge did not establish the date of onset, but showed only that the miner developed complicated pneumoconiosis at some point before his death. Because the employer failed to point to earlier evidence "disproving the presence of complicated pneumoconiosis" at some point after the filing date of the miner's claim, the court upheld the administrative law judge's use of the month of filing as the entitlement date. *Bridger Coal Co. v. Director, OWCP [Ashmore]*, 669 F.3d 1183, 1195, 25 BLR 2-89, 2-109 (10th Cir. 2012). It was "inadequate" for

employer to point to x-rays, CT scans, biopsies, and medical opinions that did not diagnose the miner with complicated pneumoconiosis during his lifetime, given the more definitive autopsy evidence credited by the administrative law judge. *Ashmore*, 669 F.3d at 1195-96, 25 BLR at 2-111.

### **Onset Date of Complicated Pneumoconiosis and Determining Liability for Benefits**

The date of onset of complicated pneumoconiosis may affect the determination of the employer or insurance carrier that is liable for the payment of benefits. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-190 (2006)(en banc)(McGranery & Boggs, JJ., dissenting on other grounds); *Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51-52 (1991). For more on this topic, consult the Responsible Operator section of this deskbook.